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Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

1. In the lower courts, the Respondents Associated Builders and Contractors of Massachusetts/Rhode Island et al. ("Respondents" or "ABC") never claimed that any action of the Massachusetts Water Resources Authority ("MWRA" or "the Authority") constitutes, or causes, any unfair labor practice prohibited by the National Labor Relations Act ("NLRA"). Rather, throughout this litigation, Respondents' complaint has been that even though the NLRA does *not* expressly prohibit any aspect of what the MWRA has done, the Act, *by implication*, preempts the Authority from acting as it has regarding the project labor agreement covering MWRA's Boston Harbor Project.

It has also been a fixed point in this case that the project labor agreement between Petitioner Kaiser Engineers, Inc. ("Kaiser"), the construction manager for the Boston Harbor Project, and Petitioner Building and Construction Trades Council of the Metropolitan District ("BCTC" or "Trades Council") is a valid labor agreement of the kind contemplated by the construction industry proviso of NLRA § 8(e) and by NLRA § 8(f), 29 U.S.C. §§ 158(e) & (f).

The district court so concluded. *See* MWRA Pet. App. 76a-77a. The General Counsel of the NLRB—who, subsequent to the district court decision in this case rejected a challenge to the agreement by one of Respondents' amici—so concluded. *See* MWRA Pet. App. 88a-93a. And, the court of appeals majority, in turn, endorsed this conclusion:

> [U]nder the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract. That conclusion, however, is irrelevant to the preemption issue at hand. Appellants do not challenge the validity of that agreement; they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing

> of the Master Labor Agreement as a condition of the award of an MWRA bid. [MWRA Pet. App. 24a (citations omitted).]

As this passage shows, what the MWRA has done is to declare, through its bid specification, that the Authority, as the owner of certain property that is being developed, will exercise its property rights to support the terms of a valid project labor agreement between the construction manager in charge of developing that property and a council of area construction unions. It is up to the Respondents to show that the Authority's action—though it violates no provision of the NLRA and exerts no pressure on any other entity to violate any such provision—is nonetheless in conflict with the Act's overall plan. This is a burden the Respondents have not carried.[1]

2. The court of appeals, though it based its holding on the preemption doctrine stated in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), added that the preemption doctrine stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), is also "implicated." MWRA Pet. App. 15a. Until now, neither the court below, the Respondents, nor any amicus has explained that Delphic utterance.

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[1] Respondents repeat their argument made to the courts below that the project labor agreement before the Court is somehow infirm because the MWRA is not "an employer in the construction industry" and so cannot come within the construction industry proviso of NLRA § 8(e). Resp. Br. at 21-22. As we have pointed out in our principal brief, this argument is a red herring. *See* Brief for Petitioners ("Pet. Br.") at 26-30.

The MWRA does not claim to be an employer for purposes of NLRA §§ 8(e) and 8(f). But, in any case, this issue is academic, because both the Board and the courts below held the project labor agreement to be a valid agreement between a construction industry employer (Kaiser) and a council of unions representing construction employees (BCTC). As noted in the text, Respondents' claim has been that the Authority's support of this valid agreement is preempted, and, as we will show, the tortuous parsing of the language of the NLRA that is offered by Respondents regarding MWRA's status as an NLRA employer is completely irrelevant to this argument. *See* pp. 18-19, *infra*.

Amicus Association of General Contractors of America ("AGC") attempts an explanation that proceeds from a premise appearing in a number of the submissions on Respondents' behalf—whichever form of labor preemption is being argued. The claim is that MWRA's bid specification interferes with the right of workers to be free of "a union's power to organize the employees of private construction employers from the 'top down'" (AGC Br. at 12), and imposes on nonunion employers, as a condition of being awarded a contract or subcontract, the requirement that they surrender their right as employers "to refuse to recognize and bargain collectively with a union not designated by a majority of their employees or certified by the . . . [NLRB] after an election." (Brief *Amicus Curiae* of the National Right to Work Legal Defense Foundation Inc. at 8.) The premise of this claim is wrong and so is its conclusion.

The canonical form of the question before the Court in considering a claim of *Garmon* preemption has always been whether the state is purporting to regulate activity arguably protected by NLRA § 7 or arguably prohibited by NLRA § 8. *See* 359 U.S. at 244.[2]

The MWRA's bid specification is not regulation in the normal sense of that term at all, and MWRA does not even "purport to regulate" here. Nor does the bid specification *affect* activity protected by NLRA § 7 or prohibited by NLRA § 8. The protections of § 7 are specifically qualified by the construction industry proviso of § 8(e) and by § 8(f), which apply to, and are fully respected by, the project labor agreement. The prohibitions of § 8 are likewise tailored to conditions in the construction industry by these NLRA provisions, and the project agreement, in turn, is also tailored to comply with

[2] *Accord, Belknap v. Hale*, 463 U.S. 491, 498 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 183 & n.4 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 296 (1977); *Machinists, supra*, 427 U.S. at 138-139; *Linn v. Plant Guards*, 383 U.S. 53, 59-60 (1966).

these provisions. That is why the Board dismissed all charges of violation of the federal labor laws.

Respondents' and their amici's animadversions against union signatory and pre-hire agreements should arouse skepticism about the soundness of their arguments that follow. The Act's special legislative provisions for the construction industry represent Congress' principled solution to an important need. Special construction industry arrangements were made because Congress recognized that workers in that industry often do not establish a long-term relationship at a fixed site with either a particular employer or with each other, while they often retain a long-term relationship with a craft union that provides referral and representational services as the workers move among employers.

That being so, Congress judged that construction workers would often be deprived of the benefits of union representation and the protections of collective bargaining agreements—and the construction industry would be denied the benefits of labor relations stability—should union representation depend on employer-by-employer organizational activity followed by representation elections. Congress believed that the latter regime too often would leave construction workers without an adequate opportunity to select union representation and that this danger outweighs the risk that union signatory and pre-hire arrangements would impose union representation on unwilling workers. *See* Pet. Br. at 9-10, 11-15; *Jim McNeff v. Todd*, 461 U.S. 260, 266 (1983). In any event, Congress believed that an appropriate balance would be struck by allowing subsequent decertification elections if workers found themselves with an unwanted bargaining representative. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 664 (1982).[3]

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[3] A number of amici make something of the possibility that, although a subsequent vote by the employees of a particular employer may decertify the union as the bargaining agent for their bargaining unit, it would do so at the risk of jeopardizing the

Thus, the construction industry employee and employer interests that Respondents and their amici appeal to are not recognized by the NLRA as "rights" that trump the authority of a construction manager and construction unions to enter into a project labor agreement such as the one here. And the pressures on employer and employee interests generated by such an agreement, about which Respondents and their amici complain, are lawful pressures that Congress validated in the construction industry proviso of NLRA § 8(e) and in NLRA § 8(f). *See Woelke & Romero*, *supra*, 456 U.S. at 663 ("It is . . . true that secondary subcontracting agreements like these at issue here create top down organizing pressure. . . . Such pressure is implicit in the construction industry proviso. . . . Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective bargaining objectives."). *See also Jim McNeff, Inc.*, *supra*, 461 U.S. at 270 & n.9.

Validation of the MWRA's bid specification—far from requiring the exemption "from this Court's settled principles of labor law preemption" that Respondents posit (Resp. Br. at 20)—requires only a straightforward ap-

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employees' and their employer's continuing employment on the project. *See, e.g.*, AGC Br. at 11. It is significant that, as far as we have been able to discover, there are no litigated cases disputing a contractor's right to remain on a project after such a decertification. Bid Specification 13.1, moreover, must certainly be read as calling for continuing compliance with the labor laws and may, therefore, fairly be read as excusing conformity with the project labor agreement insofar as compliance with its literal terms would no longer be lawful. That being so, there is no reason to assume that the MWRA would revoke the contract of the employer of such a decertifying unit. In any event, Respondents' complaint that a unit's decertification right insufficiently protects workers' options quarrels not with the terms of this agreement, nor with the MWRA's bid specification, but with the scheme enacted by Congress in NLRA §§ 8(e) and 8(f). This Court in *Woelke & Romero* made quite clear that this was indeed the balance struck by Congress and no complaint against that balance would be entertained. *See* 456 U.S. at 663.

plication of the policies Congress adopted in the NLRA's construction industry provisions. *See Woelke & Romero*, *supra*, 456 U.S. at 662-65. Accordingly, there is nothing at all to the argument that Bid Specification 13.1 somehow constitutes regulation interfering in any manner with conduct protected by NLRA § 7 or prohibited by NLRA § 8. The rights of construction industry employers and employees in this context are defined by the construction industry provisions of the Act. The project agreement between Kaiser and the BCTC fully embodies those rights, and the bid specification does nothing more than give the agreement full effect.

3. As to *Machinists* preemption, with which we treated extensively in our opening brief (Pet. Br. at 22-33, 35-36), only a few points need be added in the light of Respondents' contentions.

a. Respondents have, from the first, argued that, regardless of the impact that a private construction contractor's labor relations practices may have on the proprietary interests of a state agency seeking to develop its property, the agency may not "interfere" with those practices because the agency is the state. *See, e.g.*, Resp. Br. at 14-15, 18-19. But this argument proves far too much. The argument rests either on the wholly unworldly assumption that Congress believed state owner-developers making purchasing decisions on large construction projects are unaware of, and uninterested in, the possible labor relations problems that may arise on their construction sites, or on the even more far-fetched assumption that Congress somehow intended to require the state to expunge all such awareness and interest from consideration in making its construction purchasing decisions.[4]

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[4] Indeed, as we noted in our initial brief, the legislative history on this point is entirely to the contrary. Thus, a legislative memorandum circulated by Representatives Thompson and Udall—two sponsors of the provision that would become NLRA § 8(f)—noted that the contractual arrangements at issue had "been encouraged by the Atomic Energy Commission and other government agencies" with respect to construction of their own public works projects. 2

In the real world, state owner-developers—like private owner-developers—faced with proprietary concerns like those of the MWRA, form and express a preference for or against a project labor agreement. *See* note 4, *supra*. Nevertheless, according to Respondents, any action by a state owner to implement a favorable preference would constitute impermissible state coercion of construction industry employers and employees. Thus, the effect of Respondents' arguments would be to render illegal—on grounds of federal preemption—virtually all project labor agreements on state construction projects.[5]

NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1578. And, the Senate Report supporting the original version of that provision had stated that validating such construction industry agreements served the interests of the United States, not only because the provision would promote "the general welfare," but also because it would promote the interests of the Government as an owner of property "directly concerned in the proper pricing and completion of [its] construction projects." S. Rep. 1509, 82d Cong., 2d Sess. 3 (1952). *See generally* Pet. Br. at 30-33 & n.15 (reviewing extensive evidence before Congress that the contractual arrangements at issue were widely used on public construction projects, and served the interests of public owner-developers).

[5] To be sure, amicus AGC questions the proposition that owner-developers in the private sector often influence the decision to seek a project labor agreement, albeit without offering any citations to back up its resistance to it. *See* AGC Br. at 25 & n.8. However, the fact of the matter is that private owner-developers often make the decision that a project labor agreement will govern their projects, and the owner's decision is based on the owner's determination as to where its economic interests lie and what arrangements should be made to protect and advance those interests. As we stated in our initial brief, this fact has been noted in a leading treatise on construction industry labor relations and in a United States Department of Labor study of the subject. See D.Q. Mills, *Industrial Relations and Manpower in Construction*, 40 (1972); U.S. Department of Labor, Labor Management Services Administration. *The Bargaining Structure in Construction: Problems and Prospects*, at 14 (1980). *See generally* Pet. Br. at 13-15. A variety of other sources are in accord. *See* M. Stokes, *Labor Law in Contractors' Language*, 195 (1980) ("owners often provide the driving force to negotiate a project agreement"); C. Bourdon & R. Levitt, *Union*

As we emphasized in our principal brief, the result urged by Respondents would, first of all, mandate that labor relations on public construction projects be controlled by a unique and artificial interplay of forces wholly unlike the interplay of forces on private construction projects. On Respondents' theory, the economic interests of the owner on a *public* project—and only on a public project—would be removed as a factor influencing the arrangements governing project labor relations. *See* Pet. Br. 24-26. Far from furthering the policies behind the *Machinists* labor preemption doctrine, such a result would undermine those policies. *See Machinists*, 427 U.S. at 140.

b. Respondents' arguments that the state cannot be involved in the labor relations decisions of the construction employers working on a public project, even when those decisions affect the state's proprietary interests, find no support in the decision on which the Respondents principally rely—*Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282 (1986). In *Gould*, Wisconsin ran afoul of the *Garmon* doctrine because, for reasons wholly unrelated to any of its proprietary interests, Wisconsin acted to impose a blanket rule intended to supplement the sanctions imposed by the NLRA on employers who violate the unfair labor practice provisions of NLRA § 8. 475 U.S. at 287. The *Gould* Court did not suggest that the same result would follow when the state action raised no issue of *Garmon* preemption or arose in a context where the action was plainly motivated by proprietary concerns. It is thus critical that in this case, unlike *Gould*, the state decision was influenced by purchasing,

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and Open-Shop Construction, at 107-108 (1980) ("Industrial users [of construction] have . . . found project labor agreements helpful in the short term to construct their plants . . . at a lower cost than could be obtained under the existing labor agreements, and usually without the risk of strikes"); 2 Business Roundtable, *Coming to Grips With Some Major Problems in the Construction Industry: Special Building Trades Agreements*, 29-30, 32-39 (1978) (extensive discussion of role of owners in promoting project agreements).

not regulatory or policy concerns. *See generally* Pet. Br. 34-35.

c. Respondents and their amici contend that this distinction is too hard to draw and too easy to abuse, and hence too fragile to be followed. In so doing, Respondents and their amici take leave of *Gould* entirely. For that decision, rather than adopting or suggesting a *per se* rule of preemption, carefully limits its holding and rationale to situations in which the state's actions can fairly be characterized as proprietary only in form but regulatory in purpose. *See* 475 U.S. at 287-88, 289, 291. And, Respondents' argument for radically expanding *Gould* to all proprietary decisions does not withstand examination.

As the distinction between proprietary and regulatory action bears specifically on this case, we note that Respondents ignore the district court's finding that the MWRA's decision was, in fact, a proprietary decision, made on proprietary grounds. *See* MWRA Pet. App. 74a-75a. That finding is well supported:

(i) Kaiser—not the MWRA—first proposed the agreement, and did so because Kaiser believed, based on its experience as a private-sector project manager, that such an agreement would serve the interests of stability, efficiency, and expedition on the project.

(ii) There is no evidence in the record that the MWRA was moved to accept Kaiser's proposal as a result of union political pressure, or for any other reasons than those relating to the efficient construction and prompt completion of the project.

(iii) Indeed, as we have emphasized, the project agreement itself, and the bid specification supporting it, are narrowly tailored to affect only those labor relations issues directly relating to the Boston Harbor Project. *See* Pet. Br. at 25-26.[6]

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[6] The contention by Respondents and several of their amici (Resp. Br. at 354 n.20; AGC Br. at 13-14; Chamber of Comm. Br. at 24-25) that the MWRA might, as an alternative, have imposed penalty

More generally, this Court has recognized in a variety of contexts the proposition that government actions are subject to different legal standards when the government is acting as a manager or proprietor of its own resources and when the government is acting as a policy maker or regulator for the society generally. *See, e.g., International Society for Krishna Consciousness, Inc. v. Lee*, —— U.S. ——, 60 L.W. 4749, 4751 (1992); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 453 (1988); *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 805 (1985).

To be sure, decisions drawn from other areas of the law do not control the interpretation of a particular act of Congress, but these decisions do show that the distinction between the state acting as a proprietor and the state acting as a regulator is one that the Court believes can meaningfully be drawn. As the Court noted in the context of a commerce clause case:

> When a State buys or sells, it has the attributes of both a political entity and a private business. . . . While acknowledging that there may be limits on this sweepingly phrased principle, we cannot ignore the similarities of private businesses and public entities when they function in the marketplace. [*Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12. (1980).]

The "similarit[y]" to "private businesses" in this case is the critical factor making this case qualitatively different from *Gould*.

4. Respondents and several of their amici (*e.g.*, Resp. Br. at 31-32; AGC Br. at 17-18) suggest, for the first time

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clauses to assure prompt contractor compliance with the court-imposed deadlines is inadequate. First, such an approach could well force MWRA to suffer the disruption and be satisfied only with the option of subsequently seeking adequate compensation, a process that would obviously be plagued with additional costs and uncertainties. Second, any penalty clause sufficient to assure compliance, even in the face of labor disruption, or to compensate the MWRA for all added costs and fines that such delays might entail, would surely be so onerous that no contractor would accept it.

in this Court, that had a private party done what the MWRA has done, that private party would run afoul of the prohibitions of the NLRA—in particular the ban against "hot cargo" agreements in § 8(e). The arrangement between Kaiser and the Trades Council, they imply, would violate § 8(e) if the MWRA were a private party, because of the MWRA's approval of that agreement and because of the Authority's support for the agreement in Bid Specification 13.1.

In essence, this is a late-blooming argument that a private owner-developer somehow violates NLRA § 8(e) if the private party (i) follows the labor relations advice of its construction manager by allowing the manager to negotiate a project labor agreement, (ii) retains the right to select project contractors, and (iii) utilizes that retained right to support the agreement, by requiring all of its contractors to adhere to the terms of the project agreement negotiated by the construction manager. But Respondents fail entirely to justify any such conclusion.

Respondents' new argument cannot be squared with the premise on which the case has been litigated until now, or with the conclusion of the Labor Board, the district court, and the court of appeals that the project labor agreement between Kaiser and the BCTC is a valid agreement under the construction industry proviso of NLRA § 8(e) and NLRA § 8(f). *See* pp. 1-2, *supra*. And, as we now show, the assertions by Respondents and their amici that the NLRA would prohibit a private owner from playing the role played here by MWRA in support of the project labor agreement are not justified by any of the relevant NLRA authorities.

a. In essence, Respondents' argument rests on the premise that, under the NLRA, the decision by an employer in the construction industry (in this case Kaiser) to conclude a project agreement must be made and carried through in a vacuum, wholly free from the influence of the owner's preferences and concerns relating to that decision and from the owner's assistance in implementing

that decision. No such requirement appears in the statute. Indeed, such a requirement would be quite unrealistic.

The participation of the Saturn Corporation—as owner-developer—in the project agreement concluded by Morrison-Knudsen that was described in our principal brief, and that was affirmed as lawful in an extensive NLRB Advice Memorandum, is representative of the wholly appropriate role that concerned owner-developers may play. *See* Pet. Br. at 15 & n.8, 28; *Morrison-Knudsen*, 13 NLRB Advice Mem. Rep. ¶ 23,061 (March 27, 1986), *reprinted at* BCTC Pet. App. 97a-102a (affirming the validity of the Saturn Corporation project labor agreement, which was challenged on the theory that, because of extensive ownership involvement, the construction manager was "not the real party of interest but "only . . . an agent of [the owner]").

Indeed, Saturn Corporation played a role with respect to the project labor agreement in that case which was at least as active as the role played by MWRA here. As the General Counsel explained, the owner, on its own and for its own proprietary reasons, "made the decision that the . . . facility would be constructed pursuant to a project agreement and [retained] the final authority as to which contractors will actually be awarded the project bids." BCTC Pet. App. 101a. On those facts, the NLRB General Counsel fully affirmed the validity of the agreement and the lawfulness of Saturn's conduct.[7]

[7] Amicus AGC, (AGC Br. at 25 n.8) seeks to distinguish *Morrison-Knudsen* by asserting that the owner-developer in that case was not itself charged with a violation of § 8(e). The assertion is not correct. An examination of the record in *Morrison-Knudsen* confirms that Saturn Corporation was charged with a violation of § 8(e)—*see* NLRB Case No. 26-CE-10—and that the Advice Memorandum recommended dismissal of this charge along with all others. *See* BCTC Pet. App. 97a (listing NLRB Case No. 26-CE-10 as one of the charges being dismissed pursuant to the Advice Memorandum); *see also* Appeal of the Regional Director's Refusal to Issue Complaint in NLRB Case Nos. 26-CA-11428, 11429, & 26-CE-8, 9, 10 & 12 (filed by Associated Builders and Contractors, Inc. on be-

As *Morrison-Knudsen* illustrates, the fact that an owner has retained the right to select contractors and uses the right to support a project labor agreement in no way calls into question the validity of the project agreement. Owner-developers have chosen to develop their property through two basic kinds of arrangements with construction industry employers. The owner may choose to use a "general contractor" (a construction industry specialist who takes responsibility for managing and supervising all the work and then contracts out some of it) or a "construction manager" (a similar specialist—indeed often the same firm as might operate as a general contractor—who manages and supervises the overall project and takes responsibility for specific work, but who does not have a right to select the contractors that do the balance of the work, that right being retained by the owner). Nothing in federal law requires owners to use general contractors rather than construction managers or vice versa, and nothing in federal labor law indicates that Congress had any care as to which of these arrangements an owner might choose.

b. Respondents proceed by ignoring most of the relevant authorities on the law and practice of owner-developer involvement in construction industry project labor agreements. Such authority as there is in this regard—with

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half of charging parties, May 12, 1986), at 3 ("On December 12, 1985 . . . charges were filed against Saturn Corporation . . . , Morrison-Knudsen, Inc., . . . , and the Building and Construction Trades Department, AFL-CIO.").

Respondents' efforts to distinguish *Morrison-Knudsen* are equally unavailing. Respondents simply assert, without explanation or citation, that the owner in that case "was not a 'party in interest in the agreement'" and that "no action by the owner was required to implement the agreement." Resp. Br. 32. These assertions are beyond understanding given that, in *Morrison-Knudsen*, Saturn had, on its own, decided that there should be a project labor agreement, instructed its construction manager to negotiate one, and retained the right to select all jobsite contractors. BCTC Pet. App. 101a. Moreover, Morrison-Knudsen had expressly described itself as "acting as the agent of Saturn in administering construction activities at the site." *Id.* at 97a.

the possible exception of one court of appeals decision favorable to us—comes from NLRB proceedings.

For almost thirty years, the Board has held that the construction industry proviso of NLRA § 8(e) validates agreements entered into by a construction industry employer and union, even when the effectiveness of the agreement requires the employer to obtain the cooperation of the project's owner, or some other employer, who has retained control of the selection of contractors. *See Local 217, United Association (Carvel Co.)*, 152 NLRB 1672 (1965). And, on this basis, it is clear that construction managers, no less than general contractors, negotiate § 8(e) construction industry agreements under the NLRA system, even though it is the owner who selects contractors. *See Southern California Conference of Carpenters (Contractor Negotiating Committee)*, Advice Memorandum, Case Nos. 21-CB-8543 & 21-C-1765 (Oct. 31, 1983), *reprinted* at 29 Construction Labor Report 1275, 1278 (Nov. 6, 1983) (holding such agreements by construction managers to be fully valid); *see also Morrison-Knudsen*, *supra*. The construction manager-employer who signs such an agreement, the Board reasons, is taking on an obligation to furnish the jobsite conditions called for in the agreement, and this may require that he obtain cooperation from the owner, or from some other employer, who has retained the right to control contractor selection on the jobsite. *Carvel Co.*, *supra*; *Contractor Negotiating Committee*, *supra*.

Moreover, under the NLRB decisions, an owner who retains the right to select all contractors and subcontractors on a construction site, and thereby exerts significant control over jobsite labor relations, may on that basis be considered "an employer in the construction industry." *See United Brotherhood of Carpenters (Longs Drug Stores)*, 278 NLRB 440 (1986); *Los Angeles Building Trades Council (Church's Fried Chicken)*, 183 NLRB 1032 (1970); *see also A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1989). Indeed, as the Board makes clear

in *Longs Drug Stores*—a case which involved an owner who primarily operated a chain of retail stores—this is so precisely because one of Congress' goals in passing the construction industry proviso of NLRA § 8(e) was to validate agreements governing overall jobsite labor relations.[8]

c. Amicus AGC (at pp. 18-20), and to a lesser extent Respondents (at pp. 31-33), urge *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), in their effort to establish the unlawfulness of MWRA's actions here. *Connell* has no bearing on this case.

In *Connell*, the Court found a particular construction industry agreement to be unprotected by the construction industry proviso to NLRA § 8(e) because the agreement was not negotiated in "the context of collective bar-

[8] The Board reasoned:

> [W]hether an employer not primarily in the construction business may be deemed to be an employer in the construction industry for purposes of the first proviso to Section 8(e) is dependent on the degree of control over the construction-site labor relations it elects to retain. As its own general contractor, an employer retains absolute control. Thus, as stated in *Church's Fried Chicken*, *supra*, quoting from the legislative history of the proviso (2 Leg. Hist. 1425(1) (NLRA 1959):
>
> > The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a jobsite which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations.
> >
> > He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies . . . He is not innocent of any unfair labor policies on the part of a subcontractor.
>
> Similarly, in situations where an employer hires a general contractor, but nonetheless regularly makes decisions, including the selection of subcontractors, normally within the scope of a general contractor's duties and authority, it would appear that the employer retaining such authority is tantamount to a general contractor. And this reasoning would appear to hold true regardless of whether the employer is the owner of the premises under construction or a prospective lessee. [272 NLRB at 442.]

gaining relationships," 421 U.S. at 633, and was not an effort to solve the problems of friction caused by having union represented subcontractors "employed alongside nonunion subcontractors" on the same jobsite, *id.* at 631.[9] The *Connell* Court explained that agreements failing to satisfy *either* of these tests—even if within the literal wording of the § 8(e) construction industry proviso—are outside of its protection, because outside of Congress's purposes in passing the proviso:

> [W]e think [the proviso's] authorization extends only to agreements in the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem [referring to the issue of jobsite friction between the employees of union and nonunion contractors on a single jobsite, *see NLRB v. Denver Building Trades*, 341 U.S. 675 (1951)], possibly to common-situs relationships on particular jobsites as well. [421 U.S. at 633; *see also id.* at 628-31.]

The project labor agreement here meets *both* of these tests. The agreement was adopted by Kaiser "in the context of collective bargaining," and one of its purposes is to avoid problems of jobsite friction by governing "common situs relationships on [a] particular jobsite[]."

Thus, Respondents' reliance on *Connell* must be understood as another effort to call into question whether federal law allows an owner-developer to support, for fully appropriate proprietary reasons, a project labor agreement consumated by its general contractor or construction manager that conforms in all respects to the conditions and requirements of federal law.[10] The answer

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[9] The agreement in *Connell* was an agreement between a single craft union local and a general contractor employing no members of the union's craft. The agreement required that, on any project undertaken by the general contractor, all work in this craft be contracted to employers who had previously entered agreements with the union local, regardless of whether, on any given site, other contractors employing other crafts would be unionized. 421 U.S. at 619-621, 631.

[10] To be sure, Respondents and their amici contend that even if Kaiser and the Trades Council could be parties to a valid agreement,

to that question is not supplied by *Connell*—indeed *Connell* has no bearing on it. The answer, under *Morrison-Knudsen Co. Inc.*, 13 NLRB Advice Mem. Rep. ¶ 23,051 (March 27, 1986) and generally applicable principles of federal law, is that the owner-developer may properly take such action. *See* pp. 11-15 and nn. 7, 8 & 10, *supra*.[11]

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the agreement here is invalid because it must be treated as if it were an agreement between the MWRA and the Trades Council. *Connell* certainly provides no authority for overriding the conclusion of the Board and the court below on this score. *See* note 9, *supra*. And, as we have shown, the relevant NLRA authority is contrary to the Respondents' position. *See* pp. 11-15 and nn. 7 & 8, *supra* (discussing *Morrison-Knudsen*, *supra*; *Carrel Co.*, *supra*; and *Contractor Negotiating Committee*, *supra*). *See also Baltimore Building Trades Council (Whiting-Turner Contracting)*, 7 NLRB Advice Mem. Rep. ¶ 17,167, at n.6 (May 30, 1980) (where both owner and construction contractor signed agreement, General Counsel would not analyze validity of agreement in terms of owner's status because owner "entered into this contract only because of its association with [the construction contractor] on this site").

A number of the amici find support for their mischaracterization of this arrangement in a statement printed on the cover of some copies of the master agreement between Kaiser and the BCTC listing "Kaiser Engineers, Inc. on behalf of the Massachusetts Water Resources Authority." MWRA App. at 107a. This phrase, which refers accurately to the fact that Kaiser was acting as MWRA's project manager and entered into the project agreement in that capacity, hardly can be invoked to expunge the fact that the agreement was with Kaiser as a principal. In any event, a single remark on the cover of a document that was not raised until this late date in this litigation cannot be made to contradict the litigated factual record, the parties' understanding of the agreement, and the findings of two courts about the nature of the contractual relations contained in the document. *Cf. Whiting-Turner Contracting*, *supra*.

[11] Respondents and amicus AGC offer string cites of unexplained authorities in an effort to demonstrate that such an owner-developer role is illegitimate. Respondents' Brief at 31; AGC at 17-18. The irrelevance of these cases to the issues here highlights the unsoundness of their arguments.

Several of these authorities simply draw the boundary line between the construction industry and other industries: *Local 1149, United Brotherhood of Carpenters (American President Lines, Ltd.)*, 221 NLRB 456 (1975), *enf'd.*, 81 Lab. Cas (CCH) ¶ 13,

* * * *

We conclude by emphasizing that this is a *preemption case*. To be sure, the Respondents' diversionary disputations on possible issues regarding private owner-developers and the law of NLRA § 8(e) grow out of an analogy we first offered. But in seeking to refute our

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137 (D.C. Cir. 1977) (repair and maintenance of cargo containers not a construction industry activity); *Forest City/Dillon-Tecon Pac.* 209 NLRB 867 (1974), *enf'd in part*, 522 F.2d 1107 (9th Cir. 1975) (factory manufacture of preassembled elements to be incorporated later in construction is not itself a construction industry activity); *NLRB v. W.L. Rives Co.*, 328 F.2d 464 (5th Cir. 1964) (same); *Local 1937, Painters & Glaziers Dist. Council No. 5 (Prince George's Center, Inc.)*, 183 NLRB 37 (1970) (building repainting and maintenance not construction industry); *Frick Co.*, 141 NLRB 1204 (1963) (manufacturer of refrigeration equipment is not a construction industry employer even if a small portion of its business is the installation of the equipment). Of course there is not the least question that the activity in issue here—the construction of a massive system of waste treatment facilities—is construction.

Another authority, *A.L. Adams Constr. Co. v. Georgia Power Co.* 733 F.2d 853 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1989), held that a power company, in the position of an owner-developer, *is* an employer in the construction industry when the company undertakes to act as its own general contractor, even though the bulk of its employees are not in the construction industry. *See id.* at 856-58. Thus, as we have noted (*see* page 11, *supra*), *A.L. Adams* supports our position in this case.

Of particular interest is the difference between this case and *Columbus Bldg. & Constr. Trades Council (Kroger Co.)*, 149 NLRB 1224 (1964), which has been cited for the proposition that owners may not seek to influence project labor agreements. *See* Resp. Br. at 31. *Kroger* involved the issue of whether a potential lessee of a construction site, the Kroger Company, might be considered a construction industry employer. As the Board explained in *Longs Drug Stores, supra*, its holding that the lessee was not such an employer was based on the fact that Kroger—unlike MWRA and similarly-situated private owners—was an employer not primarily in the construction industry, *who did not retain any significant role with respect to labor relations on the project. See Longs Drug Stores, supra*, 272 NLRB at 442-43 (quoted at note 8, *supra*). The case in no way held that Kroger *could not* retain such a role. *Id.*

analogy by raising hypothetical and hypertechnical arguments that find no support in the established law, Respondents and their amici ignore the point of decision in this case and the way in which our analogy illuminates that point.

Where a judicial proceeding, such as this case, rests on a claim of implied preemption, grounded on the *Machinists* doctrine, the central issue must be whether the action of the state agency is in some way inconsistent with the federal statute or its underlying structure and purposes. As we have shown many times over, there is no inconsistency here with any explicit term of the NLRA. Thus, any analogy can do no more than illuminate whether MWRA's bid specification is inconsistent with the purposes and structure of the Act. And, none of Respondents' arguments can obscure the critical point that, *in substance*, MWRA has sought nothing more than to accomplish what the Act allows private contractors and owner-developers to accomplish.

The NLRA § 8(e) arguments raised against us—each of which focuses on particular aspects of *the form* of this transaction, and each of which we have refuted—do not challenge this fundamental point. The law of preemption is not concerned with such formalisms, but rather with whether *the substance* of the relationship conflicts with the letter or the policies of federal labor law.

If Respondents are attempting to argue more broadly —and draw the Court into ruling—that even formal changes could not save this arrangement because an owner-developer may never, under the NLRA, seek to influence the labor relations arrangements on its construction projects (regardless of the proprietary interests it has at stake), then Respondents' contention is indeed substantive, and radically so: it is also unprecedented, unreasonable and unwarranted.[12]

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[12] Respondents and their amici (Resp. Br. at 20 n.9; AGC Br. at 15-16) contend that the Solicitor General has "conceded" that a

CONCLUSION

For the reasons stated above, and in our initial brief, the decision of the First Circuit should be reversed.

Respectfully submitted,

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state bid specification implementing an agreement not valid under the national labor laws might well be preempted. We fail to see how this "concession" advances Respondents' case. If the project agreement between Kaiser and the BCTC required, for instance, that anyone employed on the project must be a full union member (rather than merely accept the financial "agency" relation described in *NLRB v. General Motors*, 373 U.S. 734 (1963)), then any attempt to enforce such a term would constitute an unfair labor practice, and a state bid specification to the contrary would not shield the employer or union from that result. A state might even be enjoined from taking action against an employer-contractor who refused to enforce such an invalid provision. But this analysis only lends emphasis to the point that in this case, the agreement and all of its provisions have been found to comply fully with the NLRA.

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